UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

DAVID L.	:	
	:	
v.	:	C.A. No. 17-00562-JJM
	:	
NANCY A. BERRYHILL, Acting Commissioner of the Social Security Administration	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed his Complaint on December 3, 2017 seeking to reverse the Decision of the Commissioner. On April 9, 2018, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (ECF Doc. No. 8). On May 3, 2018, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (ECF Doc. No. 9).

This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); LR Cv 72. Based upon my review of the record, the parties' submissions and independent research, I find that there is substantial evidence in this record to support the Commissioner's decision and findings that Plaintiff is not disabled within the meaning of the Act. Consequently, I recommend that Plaintiff's Motion to Reverse (ECF Doc. No. 8) be DENIED and that the Commissioner's Motion to Affirm (ECF Doc. No. 9) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed applications for DIB on March 13, 2015 (Tr. 183-186) and SSI on March 18, 2015 (Tr. 187-195) alleging disability since January 1, 2006. The applications were denied initially on May 11, 2015 (Tr. 74-86, 87-99) and on reconsideration on July 28, 2015. (Tr. 102-112, 113-123). Plaintiff requested an Administrative Hearing. On July 13, 2016, a hearing was held before Administrative Law Jason Mastrangelo (the "ALJ") at which time Plaintiff, represented by counsel, and a Vocational Expert ("VE") appeared and testified. (Tr. 16-51). The ALJ issued an unfavorable decision to Plaintiff on August 29, 2016. (Tr. 52-73). The Appeals Council denied Plaintiff's request for review on August 28, 2017. (Tr. 5-9). Therefore, the ALJ's decision became final. A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ failed to properly evaluate the opinions of his treating psychiatrist, Dr. Keitner and treating therapist, Dr. Wincze.

The Commissioner disputes Plaintiff's claims and contends that the ALJ properly evaluated the treating source opinions and that substantial evidence supports his RFC finding that Plaintiff can perform a range of unskilled work.

III. THE STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner's decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec'y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ's decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980) (remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence-four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart,

274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

> The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Id. With a sentence six remand, the parties must return to the court after remand to file modified findings of fact. Id. The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. THE LAW

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

42 U.S.C. §§ 416(i), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). If a treating physician's opinion on the nature and severity of a claimant's impairments, is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. 20 C.F.R. § 404.1527(d)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of Health and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

Where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986). When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) the nature and extent of the treatment relationship; (3) the medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 404.1527©. However, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(c)(2).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 404.1527(e). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's residual functional capacity (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir.

1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth, if a claimant's impairments (considering her residual functional capacity, age, education, and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden at step five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five-step process applies to both SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as

to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(i)(3), 423(a), (c). If a claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the "grids"). Seavey, 276 F.3d at 5. Exclusive reliance on the "grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual's ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the

Commissioner's burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

> (1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
>
> (2) Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
>
> (3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
>
> (4) Treatment, other than medication, for relief of pain;

(5) Functional restrictions; and

(6) The claimant's daily activities.

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires that the testimony be accepted as true. See DaRosa v. Sec'y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, "the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

A. The ALJ's Decision

The ALJ decided this case adverse to Plaintiff at Step 5. At Step 2, the ALJ found that Plaintiff's anxiety disorder and affective disorder were "severe" impairments as defined in 20 C.F.R.

§§ 404.1520(c) and 416.920(c). (Tr. 58). The ALJ assessed an RFC for a full range of exertional work but limited nonexertionally to:

> The claimant can maintain attention, concentration, persistence, and pace sufficient to carry out simple, routine, repetitive tasks and instructions in 2 hour periods with normal work breaks. Further, the claimant can maintain occasional interaction with co-workers and supervisors but cannot interact with the general public. He can tolerate simple, routine changes in a work setting.

(Tr. 59). At Step 4, the ALJ found that plaintiff could not return to his past semi-skilled work. (Tr. 67). However, at Step 5, the ALJ concluded that Plaintiff was not disabled because he could perform other unskilled work available in the economy. (Tr. 68).

B. The ALJ's Decision is Supported by Substantial Evidence

Plaintiff was thirty-eight years old on the date of the ALJ's decision. He alleges a disability onset date of January 1, 2006. His date last insured for DIB is December 31, 2009. Other than three months of part-time work in 2012, Plaintiff has not been gainfully employed since 2005.

As to the record, the ALJ accurately observed that "[t]here are very few records overall," particularly for a case involving a claimed period of disability exceeding a decade. (Tr. 64). The record contains opinions from Plaintiff's long-term treating psychiatrist and psychologist but only limited treatment records from January to June 2016. (Exh. 6F). At the hearing, Plaintiff's counsel advised the ALJ that the record was incomplete and asked to keep the record open to obtain additional treatment records. (Tr. 19). Because of a lack of specificity as to what records might be coming and why they were not obtained earlier, the ALJ declined "at this time" to keep the record open. (Tr. 20). He did, however, indicate that any additional records obtained could be submitted

with a "405.331 argument" and he would consider it. (Tr. 20, 50). The record does not reflect that any additional records were submitted.[1]

In reaching his RFC determination, the ALJ relied upon and gave "substantial evidentiary weight" to the opinions of the consulting psychologists, Dr. Harris and Dr. Clifford. (Tr. 67; Exhs. 1A and 5A). The ALJ found that their opinions were consistent with the record as a whole and not called into question by any substantial worsening of Plaintiff's condition reflected in the subsequent 2016 treatment records. (Tr. 67; Exh. 6F). The ALJ also concluded that the treating source opinions (Exhs. 4F and 5F) were entitled to "little evidentiary weight" because they were inconsistent with the record including normal mental status exams contained in the 2016 treatment records. (Exh. 6F). Both Dr. Wincze and Dr. Keitner assessed disabling symptoms and a GAF of 35 (reflecting a major impairment) in their 2015 opinions. (Exhs. 4F and 5F). However, in their 2016 treatment notes, these treating sources reported less severe symptoms and recorded GAF scores ranging from 45 to 55, (Tr. 351, 355, 368, 372, 374), reflecting more moderate symptoms.

The consulting psychologists also had the benefit of considering Dr. Cerbo's May 2015 psychiatric evaluation of Plaintiff. (Exh. 2F). Plaintiff argues that the opinions of Dr. Harris and Dr. Clifford are negatively impacted by a "notable inconsistency" in Dr. Cerbo's report. (ECF Doc. No. 8 at p. 13). In particular, Plaintiff contends that Dr. Cerbo relied on Plaintiff's reports of his ability "to complete serial 3 and serial 7 tasks, rather than assessing that function directly." Id. While Dr. Cerbo does confusingly reflect the testing result in terms of what Plaintiff "reported," (Tr. 329), the

[1] Pursuant to 20 C.F.R. § 405.331, the ALJ may accept late tendered evidence if certain conditions are met. Here, there is no indication in the record that Plaintiff's counsel made a supported § 405.331 request or actually tendered any additional medical records for inclusion in the record. Defendant represents in her brief that "[u]ltimately, no records were submitted." (ECF Doc. No. 9-1 at p. 2, n.1). Since Plaintiff elected not to file a reply brief, this assertion is unrebutted, and the Court can only assume that no records were actually submitted after the hearing.

examination section of his report makes clear that a formal neurobehavioral assessment was conducted and indicated:

> Intact attention/concentration on a serial 3 and serial 7 tasks, intact recall of four out of four objects after 5, 15, and 25-minute delays, intact paired verbal associative learning abilities and intact visual-motor-spatial abilities on a drawing task.

(Tr. 328). Thus, contrary to Plaintiff's argument, the report reasonably reflects that Dr. Cerbo actually performed the tests and did not base his clinical findings on what Plaintiff told him he would do.

Plaintiff faults the ALJ's treatment of the multiple GAF scores of record. Dr. Cerbo assessed a GAF score of 47 on May 5, 2015. (Tr. 329). A score that was considered as part of the overall record by Dr. Harris and Dr. Clifford when they made their RFC findings. Dr. Keitner and Dr. Wincze assessed GAF scores of 35 in their 2015 medical source statements completed at the request of Plaintiff's counsel but, as noted, reported GAF scores ranging from 45 to 55 in their 2016 treatment notes. The ALJ appropriately considered these scores in the context of the record and did not "disregard" such scores as argued. (ECF Doc. No. 8 at p. 10). Rather, it is Plaintiff who seeks to improperly focus solely on the one-time GAF scores of 35 and ignore the totality of the record. Plaintiff has shown no error in the ALJ's consideration of GAF scores.

This is a difficult case. There is no doubt from the record that Plaintiff has struggled with mental health issues his entire adult life and has a very limited employment history as a result. The issue in this case is not whether this Court would have granted disability benefits to Plaintiff but rather it is whether substantial evidence supports the ALJ's non-disability finding. Here, the ALJ was presented with conflicting medical opinion evidence. He appropriately weighed the evidence and relied more heavily on the opinions of the consulting psychologists. The ALJ gave good reasons for his decision to afford less weight to the treating source opinions and accurately concluded that the

severity of the symptoms reported in such opinions was disproportionate to that supported by the limited treatment records available. The ALJ was also faced with a substantial gap in the treatment records that remained unfilled by Plaintiff's counsel. Plaintiff alleges disability starting in 2006 but only presented records of sustained treatment from late 2015 to mid-2016 even though he bears the ultimate burden of proving disability. See 20 C.F.R. § 404.1512(a). Plaintiff has shown no error by the ALJ in his review of the limited treatment records presented and in his evaluation of the conflicting medical opinion evidence. The ALJ ultimately assessed an RFC for a limited range of unskilled work and, since such RFC assessment has substantial support in the record, it must be affirmed.

CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion to Reverse (ECF Doc. No. 8) be DENIED and that Defendant's Motion to Affirm (ECF Doc. No. 9) be GRANTED. I further recommend that Final Judgment enter in favor of Defendant.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 2, 2018